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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHARLES DARRYL BUSBY, Defendant and Appellant.	C056565 (Super. Ct. No. 06F03907)

A jury convicted defendant Charles Busby of brandishing a knife on one occasion, and four assaults with a deadly weapon on two other occasions (three involving a knife and one involving a car). After denying substitute counsel's motion for a new trial based on the purported ineffectiveness of trial counsel, the trial court sentenced the defendant to four years in state prison.[1]

On appeal, the defendant renews his claim of ineffective

[1] The court also revoked probation in a 2003 case not at issue in this appeal and imposed concurrent prison time.

assistance of counsel for failing to investigate personally a percipient witness or call him to testify. He contends that the nature of his former relationship with one victim did not amount to cohabitation or a dating relationship, and therefore his past acts of domestic violence against his ex-wife were not properly admissible pursuant to Evidence Code section 1109 [undesignated section references will be to this code]); however, even if the statute applied to this former relationship with the victim, the trial court abused its discretion in admitting the past acts.[2] Finally, he argues there was insufficient evidence to support an instruction on flight. We reject these claims (necessarily also rejecting his final assertion of reversible cumulative error) and shall affirm.

FACTS

Given that the defendant claims ineffectual assistance in failing to call a witness, we must summarize the evidence that actually was part of his trial. However, we limit our account of the facts to those connected with the proposed subjects of the testimony of the uncalled witness (as well as the claims of

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[2] He also makes the pro forma contentions that section 1109 and its implementing jury instruction both violate due process. He recognizes that these claims are foreclosed under California law and raises them only "to preserve [them] for federal review." We duly note and reject both arguments. (*People v. Johnson* (2000) 77 Cal.App.4th 410 [section 1109 constitutional, based on *People v. Falsetta* (1999) 21 Cal.4th 903 (section 1108)]; *People v. Johnson* (2008) 164 Cal.App.4th 731 [implementing instruction constitutional, based on *People v. Reliford* (2003) 29 Cal.4th 1007 (implementing instruction for section 1108)].)

instructional error), and we will not otherwise detail every inconsistency between the victims' testimony or between their testimony and prior statements.

I

The female victim and the defendant's housemate had known each other since 2000. They are good friends who work together reselling used items. They were never involved romantically, as the housemate is gay.

The female victim had met the defendant in 2003 and had a brief sexually intimate relationship with him that she declined to describe as being a girlfriend[3] or dating, although she did live with him "on and off for about four months."[4] His housemate mentioned to a detective that the defendant was infatuated with the ex-girlfriend, but she was averse to any renewal of the connection. The defendant had said in a statement to the detective that the female victim had been his girlfriend and broken off the relationship, but denied that this troubled him. The detective claimed that the ex-girlfriend denied having any sort of prior relationship with the defendant to him, but she testified this was the detective's misinterpretation of her

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[3] Although she eschewed the label, we will refer to her as the defendant's ex-girlfriend for convenience, rather than use the more crude (if precise) colloquialism for this relationship.

[4] She indicated at the preliminary hearing that this was while he worked on her car, but this was not part of the evidence at trial. In its pretrial ruling admitting the past acts of domestic violence, this transcript was part of the materials before the court.

comments referring to their status at the time of the incidents.

The housemate had met the defendant some time after this 2003 liaison, when the defendant moved into a room in a house where the housemate had been staying in the detached garage for a few months. Other than the incidents at issue, they were friendly with each other.

II

The housemate testified that on March 11, 2006, he heard the ex-girlfriend's car arriving at the house to pick him up. When he went outside, he saw the defendant hanging on her car, and the two of them were yelling at each other. The housemate tried to pull the defendant away from the car. When the owner of the house came outside, it apparently distracted the defendant and the housemate was able to get into the car and drive off with the ex-girlfriend. He was uncertain whether he had seen a knife in the defendant's hand. He did not report the incident at the time because it was unexpected behavior for the defendant.

However, he reported the incident to a detective a few days later because the defendant had been threatening him and his dog in the meantime. In the detective's report, the housemate said that he had already been outside at the car when the defendant came toward them with a knife, but the housemate testified that the detective must have confused his report of a different incident.

The ex-girlfriend testified that she was sitting in her car waiting for the housemate, when the defendant came charging

toward her. She rolled up the windows. He struck the driver's window with a small knife. This left a small chip in the window. The ex-girlfriend said that she had been experiencing this sort of behavior from the defendant intermittently and therefore did not report it at first until she went with the housemate a few days later to the sheriff's substation. The detective noted a scratch mark on the window.

The defendant did not testify. In his statement to a detective on May 2d, he did not address this incident. At trial, to the extent his attorney addressed this incident in closing argument, he suggested that the mark — the only evidence that corroborated their joint account — was old damage.

III

The housemate testified that on March 31, he heard the ex-girlfriend knock on the sealed front garage door, then come around to the side entrance. As he was standing in the doorway with her, he saw the visibly angry defendant come rushing from the main house with a knife in hand.[5]

The housemate briefly tried to restrain the defendant, but the latter shook him off and pursued the ex-girlfriend into the garage. The housemate did not see the defendant swing the knife at the victim, just brandish it. The defendant had her cornered

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[5] While the detective report from that night has the housemate claiming the defendant was swinging the knife wildly at him, the housemate believes this in fact happened on an earlier occasion, when the defendant had been coming into the garage and making threats against the housemate.

on the ground in the garage. The housemate could not pull him away.

Their other housemate (Darnell) arrived to help, who was a big man and good at calming down a situation. With all the people crowded into the garage, the housemate went to call 911 and drive to the nearby sheriff's substation. He could not see what was happening in the garage between the defendant and the ex-girlfriend.

The ex-girlfriend testified that after the defendant rushed at them and pushed past the housemate, she had tried to close the side door to the garage, but he got his arm through and was slashing at her. The defendant was able to push open the door. The interior of the garage was only dimly lit. She crouched in a corner with her arms over her head. He threatened her. She did not actually see the defendant continue to wave the knife at her, but she assumed he was doing this.[6] Darnell was able to get the defendant to leave her alone. Then the deputies were suddenly there. She was uninjured. She did not know where the defendant had gone, but the deputies could not find him.

In his statement to the police, the defendant claimed that he had been inside the garage with the ex-girlfriend, when she made a statement that she was going to have him killed.[7] In

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[6] However, in her report to a detective that night, she claimed the defendant had attempted to stab her 20-25 times but she was able to move out of the way of the knife.

[7] The ex-girlfriend denied ever threatening to kill him.

response, he picked up a toy pirate sword. He did not make any stabbing motions with the sword. She fell to the ground on her own. At that point, Darnell came out of the house and told him to stop what he was doing.

IV

On April 21st, the ex-girlfriend dropped off the housemate some distance from the house. As the housemate was standing there with a neighbor, he saw the defendant driving his car down the street at a high rate of speed toward the departing car of the ex-girlfriend.

When the ex-girlfriend was at a stop sign, she noticed that a car was quickly approaching behind her. After she reached Marconi Avenue, she could see it was the defendant following her. Although she attempted to evade him by going down Marconi at 50 miles per hour, he kept pace. She had to stop for a traffic light at Fulton Avenue. He brought his car to a near stop behind her, then hit her car with it. She was not injured, and there was only minor damage to the rear bumper of her car. She ran the red light and parked in the lot of the substation. The defendant did not follow her.

About an hour later, the defendant returned to his house on foot. The housemate asked what had happened to the car. When the defendant did not reply, the housemate turned away. Seconds later, the defendant grabbed him around the neck from behind and pressed the flat edge of a blade against his neck. The defendant then threw the housemate to the ground and reared back his leg as if to kick him. His dog ran out to protect him, and

the defendant lunged at the dog with a knife, threatening to harm them both.[8] Darnell came out of the house and called off the defendant. The housemate testified that a small switchblade taken from the defendant's belt on his arrest was consistent with the knife involved in this incident.

In his statement to the detective, the defendant admitted chasing after the ex-girlfriend in his car because he wanted to tell her to stop coming around. He hit her car accidentally when she suddenly changed lanes after someone cut her off. The defendant did not have any recollection of what happened after he returned home, other than arguing with the housemate and winding up on the ground with him. Initially, he denied having a knife in his hand. However, the defendant told the detective, "if Darnell said I had a knife, then maybe I did. But I don't remember having a knife."

V

The defendant's ex-wife testified. She related incidents of domestic violence that led up to their divorce. The defendant struck her in the head in January 1997. In November 1998, he stood over her with a baseball bat and threatened to crush her head. In March 1999, the defendant began yelling at her, pushed her into her son, and returned from the kitchen with a knife that he held at his side while he threatened to kill her. He hit her in the head twice. After another person

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[8] The housemate did not mention the defendant lunging at the dog in his report to a detective.

interceded, he put the knife down in the kitchen. None of these incidents resulted in any injury to her. He also made threatening phone calls to her afterward, which resulted in his arrest for his violation of a restraining order.

DISCUSSION

I

A

As noted earlier, substitute counsel brought a motion for new trial primarily focused on trial counsel's failure to call the defendant's other housemate, Darnell, as a witness at trial. Included with the motion were notes of Darnell's interviews with the detective on May 2, 2006, the defense investigator in June 2006, and the prosecution investigator in July 2006. The motion also included Darnell's July 2007 affidavit.

1. In his May 2006 statement, Darnell said that he had come out to the garage on his own on March 31st because he could hear an argument inside the garage from his room in the house. It was very dark in the garage. The defendant was yelling at the ex-girlfriend. Darnell did not see a knife in his hand or any stabbing motions. Darnell was not able to pull the defendant away from the ex-girlfriend. He left the garage to get his cane to arm himself.[9] When he returned, the defendant was gone. On April 21st, he encountered his two housemates grappling with

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[9] In his affidavit, he denied telling the detective that he went to get the cane to use on the defendant; rather, he needed it for himself, because his mobility is impaired.

each other. While the defendant kept a small switchblade in a sheath on his belt, which *may have been* in the defendant's hand, the defendant was not swinging it around. The defendant admitted to Darnell later that he had chased after the ex-girlfriend in his car.[10]

2. Darnell told the defense investigator in June 2006 that on March 31st he had heard the defendant, the ex-girlfriend, and possibly his garage housemate arguing loudly outside. When he came outside, the defendant and the ex-girlfriend were in the dark garage; he could not see the latter very clearly, but he heard her plead with the defendant not to hurt or kill her (which Darnell considered to be overly dramatic). He grabbed the defendant to pull him away. He did not hear the defendant make any threats or act to harm her, but he admitted that the defendant's back blocked his view of what was happening in the dark between them. There was another person present that Darnell did not know, who was simply a bystander. He did not know where the garage housemate was standing or what role he had played in the confrontation. As for the April 21st incident, when he approached them the defendant was standing over the garage housemate on the ground. He never saw the defendant remove the knife from the sheath on his belt. He pulled the defendant away from their housemate.

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[10] In his affidavit, he insisted that he told the detective that he never saw the defendant brandish or use a knife either on March 31st or April 21st, and denied that the defendant ever made an admission about pursuing the ex-girlfriend in his car.

3. In speaking with the prosecution investigator in July 2006, Darnell said the May 2006 summary was "reasonably accurate" (without raising the objections contained in his July 2007 affidavit). He reaffirmed that he had not seen a knife on March 31st, but the two were in a dark alcove. When he was unable to pull the defendant away because he did not have enough leverage, he went to get his cane (the notes indicating that he again expressed the intent to use it to arm himself against the defendant). The defendant was gone on his return.

4. In his July 2007 affidavit, Darnell spoke more broadly about the relationship between the three parties and his opinion of the poor veracity of the two victims. Although he was not home for the 11 March incident, he doubted that it had taken place because the victims never missed an opportunity to bad-mouth the defendant to him. He otherwise had never seen the defendant brandish or use a knife to threaten anyone, let alone the victims. He now claimed that he had finally been able to pull the defendant away from the victim on March 31st, and as they talked outside the garage the defendant did not have a knife. Darnell went briefly into the house. When he came out, the ex-girlfriend was standing there alone, and thanked him for his assistance. He had not seen the garage housemate at all during the incident. The police arrived an hour later, and did not question him. He did not add anything to his account of the April 21st fight (except the denial that any knife was present).

Substitute counsel also included trial counsel's notes of the latter's two video conferences with the defendant shortly

before the December 2006 trial (asserting that this was trial counsel's sole pretrial contact with the defendant — at some point after the June 2006 preliminary hearing, the public defender had assigned a different attorney to the case).[11] At the first, the defendant told counsel he had not been trying to stab the ex-girlfriend in the garage. He had "picked up a toy knife for his protection" that had been sitting in the garage for months among the housemate's things. She had told him of trying to hire two people to kill him. He was scared of her, as she had stabbed someone before, and he was protecting himself. He argued with her, but was not physical. At the second, counsel had "Explained why I'm not calling Darnell as W- says Δ got in V's face though he saw no knife."

In denying the motion, the court declined to find that trial counsel's decision failed to meet professional standards. "I don't think [Darnell] would have added that much."

B

The defendant asserts, "the key failure in . . . trial counsel's performance was his failure to present the testimony of [Darnell]." He stresses that Darnell consistently denied seeing the defendant with a knife in his hand on March 31st, contrary to the two victims. He also points to the housemate's consistent assertion that the defendant was not swinging a knife on April 21st, even if Darnell's first account allowed for the

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11 Trial counsel did not otherwise participate in the motion.

possibility that the knife was in the defendant's hand (which explains why the defendant was willing to acquiesce in his other housemate's account of a knife). He claims there cannot be any conceivable tactical basis for failing to re-interview the only witness who could corroborate his defense, or call him as a witness.

To the contrary, "W- says Δ got in V's face though he saw no knife" is an express reasonable tactical decision on trial counsel's part. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Pope* (1979) 23 Cal.3d 412, 425.) The absence of Darnell allowed trial counsel to argue that his testimony probably would not have been favorable to the prosecution (emphasizing that the defendant did not have any obligation to produce witnesses).

While calling Darnell as a witness would provide affirmative contrary evidence that the defendant was not armed with a knife on either March 31st[12] or April 21st, this nonetheless came with a number of significant risks. It would put Darnell's May 2006 caveat (that the defendant *might* have had a knife on April 21st) before the jury, which does not add anything to the defendant's qualified admission that he had a knife if Darnell said he did. The version of the March 31st events to which Darnell attested in his affidavit would also be inconsistent with the version that the defendant provided to his attorney just before trial, as Darnell

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12 Although the prosecution could have argued that Darnell's testimony did not foreclose the possibility that the defendant had a knife on March 31st at some point that Darnell simply could not see.

did not see even a toy sword in the defendant's hand and saw the defendant in a physical confrontation with a pleading victim that Darnell felt he needed to disrupt (however implausible Darnell may have found the pleas).

Balanced off these negative considerations in connection with the March 31st assault of the ex-girlfriend are the numerous ways in which Darnell would not have added anything to the defense case on the other counts. Darnell was not even present for the March 11th incident, and had only his own opinion about the credibility of the victims (both in general and because they had never told him about it). Nor would Darnell have had any effect with respect to the March 31st assault on the housemate, because (as the prosecution argued) that count could be based on an alleged earlier assault with a knife in the garage to which the housemate testified. Finally, Darnell was also irrelevant regarding the car chase, given the defendant's own admission to pursuing the victim.

On a separate issue, Darnell also had the potential of giving the prosecution an additional source through which to examine the defendant's ongoing fixation with the ex-girlfriend (as Darnell told the defense investigator). This would supply both motive and additional proof of their dating relationship in 2003 (a relationship that trial counsel sought to minimize in closing argument).

In short, trial counsel's decision that Darnell was not worth the risks, even without personally interviewing him, is not outside the bounds of reasonable tactics. We therefore reject the argument.

II

Regarding the evidence of incidents of domestic violence against his former wife (in particular, the use of a knife to threaten her), the defendant asserts that there is insufficient evidence to bring his 2003 relationship with the female victim within the definition in section 1109, subdivision (d)(3) (which cross-references the definitions in Penal Code section 13700, subdivision (b)[13] for the admission of prior acts more than five years old and Family Code section 6211[14] for more recent prior acts) and thereby allow the introduction of those prior acts of domestic violence. He also argues that the trial court abused its discretion under section 352 in finding that the prejudicial value of this evidence did not outweigh its probative value.

A

People v. Rucker (2005) 126 Cal.App.4th 1107, rejecting a more restrictive interpretation of "dating relationship" from a civil case involving a restraining order, found that the Family Code definitions could include a relatively new relationship

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[13] In pertinent part, "abuse committed against an adult . . . who is a . . . former cohabitant, or person with whom the suspect has had . . . a dating . . . relationship" (thereafter listing criteria for consideration in determining cohabitation).

[14] In pertinent part, "abuse perpetrated against . . . [¶] (b) A . . . former cohabitant, as defined in Section 6209 ["a person who formerly regularly resided in the household"]. [¶] (c) A person with whom the respondent . . . has had a dating . . . relationship" (defined as "frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations" (*id.*, § 6210).

that had evolved beyond a casual connection. (*Id.* at p. 1117.) The offense occurred a month after the final date in a nine-month course of engagements when the victim was in town (he went out-of-town on business three to four weeks at a time). (*Id.* at pp. 1110-1111.) *Rucker* considered this to be sufficient to establish more than a casual involvement. (*Id.* at p. 1117.)

The defendant in *People v. Upsher* (2007) 155 Cal.App.4th 1311 contended that the mere reference to someone as his girl or lady friend without any evidence about the duration of the connection or the expectations of the parties was insufficient to establish a dating relationship for purposes of proving a battery of a person with whom a defendant is having a dating relationship. (*Id.* at p. 1321.) *Upsher* found that something more than a mere casual relationship could be inferred from the conduct of the parties evincing a familiarity, testimony that they were in contact on a daily basis, and the defendant's awareness that he did not want to return to jail for another incident of domestic violence. (*Id.* at pp. 1323-1324.)

We do not need to address the defendant's claim that the female victim was not his former cohabitant, because their 2003 involvement came within the definition of a dating relationship. The defendant and Darnell both described the female victim as his former girlfriend, and even the female victim attested to an ongoing sexual relationship of several months' duration. That she may or may not have disavowed to a detective that she ever had a relationship of any kind with the defendant does not detract from this substantial evidence to the contrary. It is

not necessary that there be affection on either side, or any hope that the relationship might evolve into something more permanent, as long as there was the expectation of ongoing sexual involvement rather than a mere fling.

The defendant adverts to the testimony at the preliminary hearing that the defendant was working on her car at the time, which we take as some sort of sub rosa suggestion that the sex was a quid pro quo for the work and thus was not independent of financial considerations. This testimony, however, was not part of the actual evidence at trial and cannot be considered in determining whether a dating relationship existed that justified admitting the past acts. The defendant also points to the absence of any dominance, control, or violence on his part in the relationship (presumably along the lines of battered-spouse syndrome), and therefore this was not within the spirit of the problem that the Legislature sought to address in section 1109. He does not give any basis to impart such a judicial gloss to the plain language of the statute, which does not require any proof of that sort. We can posit that the statute equally embraces those who, by virtue of a former relationship, find themselves the unwelcome object of attention culminating in acts of violence without any past history of domination or violence. We therefore reject this argument.

B

This leaves his claim that the court abused its discretion in failing to find that the prejudicial value of the evidence (or the amount of energy devoted to proving it) outweighed its

probative value, and did not make an intelligent exercise of its discretion because it did not review the actual past acts before making its ruling. He fails to establish either proposition.

Taking the latter first, the record belies a claim that the court was unaware of the actual nature of the past acts. They are listed in the prosecutor's brief urging their admission, and are detailed in the police reports that the court expressly stated it had reviewed.

The enactment of section 1109 eliminated the consideration of the intrinsic prejudice of prior similar acts tending to show a propensity to commit them; rather they are now presumptively admissible absent a showing of prejudice against a defendant as an individual for emotional reasons unrelated to the issues being tried, or an excessive amount of effort to prove them. (*Rucker*, *supra*, 126 Cal.App.4th at p. 1119; cf. *People v. Soto* (1998) 64 Cal.App.4th 966, 984.) The relevant factors to weigh in determining prejudice are whether the past acts are more inflammatory, the possibility of jury confusion between present and past acts, the remoteness of the past acts, and whether the defendant avoided punishment for the past acts. (*Rucker*, *supra*, 126 Cal.App.4th at p. 1119.)

The past acts in the present case were not particularly egregious for domestic violence in general and exceeded the present case only in that the defendant in fact struck his wife, unlike the female victim, but without any apparent injury. Arguably, the pursuit of someone in a car is far more egregious conduct. In any event, this does not present any abuse of

discretion. We do not discern any possibility for the jury to confuse separate acts against separate witnesses. The past acts were at most nine years before trial, which again does not show an abuse of discretion in admitting them. Finally, while the jury was not presented with any evidence that the defendant had incurred criminal sanctions for his actions, they did learn of his emotional punishment for the more serious acts in the form of the divorce and the resulting estrangement from his child (and his conviction for violating a restraining order in 2003 for his postdivorce conduct). Therefore, it is not as if there were any concern the jury might use the present conviction to remedy belatedly a past wrong. On the question of undue consumption of time, the entirety of the ex-wife's direct and cross-examination consisted of 17 pages of transcript. In short, the trial court was within the bounds of reason in admitting the evidence.

III

An instruction advising a jury that evidence of flight may be considered as indicating a consciousness of guilt (but is insufficient of itself to establish guilt) is proper whenever the evidence shows a departure from the defendant's "usual environs" under circumstances suggesting a guilty motive in leaving. (*People v. Roybal* (1998) 19 Cal.4th 481, 517; *People v. Turner* (1990) 50 Cal.3d 668, 694.) As long as there is substantial evidence to support the instruction, it is for the jury to determine its significance. (*People v. Peak* (1944) 66 Cal.App.2d 894, 910-911.)

The defendant contends there is no evidence that he fled the scene of the crimes, as opposed to departing in due course before the police arrived. He thus asserts the instruction was inappropriate. (*People v. Clem* (1980) 104 Cal.App.3d 337, 344 [*victim* fled crime scene; *no* evidence about defendant's actions afterward; see *People v. Pensinger* (1991) 52 Cal.3d 1210, 1244 ["evidence that the accused left the scene and went home is not evidence of flight that necessarily supports an inference of consciousness of guilt"].)

He is wrong. The ex-girlfriend, when asked if the defendant was still at the residence when the police arrived, answered, "They couldn't find him. But, no, I don't know. I don't know." Moreover, since the sheriff did not arrest or question the defendant until more than a month later, inferentially he was not present when the deputies arrived at the home in response to the 911 call on March 31st. Therefore, since he departed his usual environs under circumstances suggesting a guilty conscience, the instruction was proper.

In any event, it is not reasonably probable that the jury would have acquitted the defendant in the absence of this flight instruction, because it leaves for the jury the determination of whether the defendant in fact manifested any behavior that amounted to flight and the weight to accord it. (*People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183; *People v. Crandell* (1988) 46 Cal.3d 833, 870.) The instruction, being cautionary, does not by its mere inclusion in the charge to the jury either invite an endorsement of the premise that there is in fact

evidence of guilty flight, or otherwise lessen the prosecution's burden of proof. (*People v. Boyette* (2002) 29 Cal.4th 381, 438-439.) Therefore, even if there was insufficient evidence of flight, we simply presume the jury found the instruction to be irrelevant.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.